

Court of Appeals has thus determined that parties in RTG's position have presented facts which, if found to be true, support a claim of "cognizable injury."⁵⁷

It is well established that one of the greatest prejudices to the decisional process, especially where a license revocation is involved, is a licensee's investment of money.⁵⁸ As the court has stated, "the Commission [is] hard pressed, making a permanent licensing decision, to disregard the prejudice that ouster would cause" for the applicant that has no investment to lose.⁵⁹ RTG will be irreparably injured by the Commission's likely inability to rescind operating authority granted to non-rural telephone companies who obtain partitioned licenses pursuant to the overturned order, so that rural telephone companies can assume their rightful partitioning privilege. In discussing the prejudicial weight of one party's financial investment against another who has made no similar investment, the court has stated, "Ordinary human experience tells us that these factors have a force which cannot always be set aside by the triers no matter how sincere their effort or intent."⁶⁰

⁵⁷ *Id.*

⁵⁸ *See La Star Cellular Telephone Co. v. FCC*, 800 F. 2d 1233, 1234 (D.C. Cir. 1990).

⁵⁹ *See Id.* at 1234, citing *Consolidated Nine, Inc. v. FCC*, 403 F. 2d 585, 594 (D.C. Cir. 1968).

⁶⁰ *Community Broadcasting v. FCC*, 274 F. 2d 753, 759 (D.C. Cir. 1990).

III. GRANT OF A STAY WILL NOT HARM INTERESTED PARTIES

A stay of these rules pending judicial review will merely preserve the status quo and presents no harm to the public and other interested parties. A stay of the *R&O* will merely continue partitioning rules that have been in effect since 1994. To the contrary, other parties will be harmed if the rules are not stayed, because parties to partitioning deals will have to expend resources seeking partitioning licenses and will have to take these licenses subject to the outcome of the pending litigation. The legal status of newly formed contractual relationships will remain in substantial doubt pending appellate review.

The court has recognized that weight should be given to Commission decisions that grant operating authority to existing operators and incumbents with existing infrastructure.⁶¹ If an initial investment has already been made, and no significant additional expenditures are required of a licensee, then the danger of prejudice to the party that rightfully acquires the authority pursuant to a court determination is minimized.⁶² Minimizing this danger of prejudice correspondingly minimizes the likelihood of subsequent litigation brought by the injured party. The Commission has already recognized the superior position of rural telephone companies in the provision of PCS services to rural America due to their existing infrastructure. Whereas rural telephone companies will be irreparably injured if the order

⁶¹ *In re La Star Cellular Telephone Co.*, *Memorandum Opinion and Order*, 4 FCC Rcd 3777, 3780 (1989).

⁶² *Id.*

becomes effective, no one will be injured if the order is stayed and rural telephone companies begin utilizing their infrastructure to speed PCS service to their subscribers. In the unlikely event that the court holds that the order should stand, no entity has lost a significant investment. Such a decision has been favorably viewed by both the court and the Commission.⁶³

IV. THE PUBLIC INTEREST FAVORS GRANT OF THE STAY

The public interest would be served by the grant of a stay. Because the rules adopted in the *R&O* effect such a fundamental change in prevailing practice, implementation of the *R&O* should await a final determination of validity. Applicants for partitioned licenses must apply to the Commission for approval. RTG will be forced to expend additional resources opposing each and every one of these applications singularly, and the Commission will be obligated to process these applications. A stay preserving the status quo would prevent confusion and significant cost and expenditure of Commission resources that is utterly needless if the Court overturns the order on its merits.

Residents of rural America will also be harmed if the *R&O* is not stayed because licenses would be partitioned to entities that have no desire to provide service to rural areas. As argued above, entities who are not rural telephone companies do not have the incentive to rapidly deploy PCS to rural Americans who live in remote sparsely populated areas.

⁶³ See generally *La Star Cellular Telephone Co.*, 4 FCC Rcd 3777 (1989).

Providing services to these citizens is not economically viable unless existing telecommunications infrastructure is used. Because the FCC's new partitioning rules do not require the partitioned licensees to serve all of the geographic territory within the partitioned area, and require, instead, that the partitioned licensee only meet the same population benchmarks the original licensee is required to meet, rural areas that are not profitable will go unserved. The rural areas will thus be held hostage if rural telephone companies are denied the opportunity to provide service.

V. CONCLUSION

The public interest would best be served by a grant of a stay. RTG and rural Americans will be harmed if the rules in question become effective before the court rules on their validity. Accordingly, RTG respectfully urges the Commission to grant a stay pending judicial review of the effectiveness of the modification of the PCS partitioning rules adopted in the *R&O*. In the alternative, RTG requests that the Commission at least grant a stay pending a decision on reconsideration of the PCS partitioning rules adopted in the *R&O*.

Respectfully submitted,

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